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No. 1039

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# In the Supreme Court of the United States

OCTOBER TERM, 1962

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W. J. DILLNER TRANSFER COMPANY, PETITIONER

*v.*

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT*

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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ARCHIBALD COX,
*Solicitor General,*

HERBERT J. MILLER, JR.,
*Assistant Attorney General,*

BEATRICE ROSENBERG,
LAURENCE P. MILLER,
*Attorneys,*
*Department of Justice,*
*Washington 25, D.C.*

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### OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-4a)[1] is not yet reported.

[1] Pet. App. refers to the appendix contained in the Petition for a Writ of Certiorari. App. I refers to Appellant's Appendix in the court of appeals. App. II refers to Appellee's Appendix in the court of appeals.

## JURISDICTION

The judgment of the court of appeals (Pet. App. 5a) was entered on March 6, 1963. A petition for rehearing was denied on March 26, 1963. The petition for a writ of certiorari was filed on April 22, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTIONS PRESENTED

1. Whether a criminal information alleging that petitioner had operated as a common carrier by motor vehicle without a certificate of public convenience and necessity in violation of Section 206(a) of the Interstate Commerce Act is defective if it fails to negate an exception contained in the proviso to that section by alleging that no application for a certificate giving effect to "grandfather rights" is pending before the Commission.

2. Whether a certificate limited to a described territory authorizes service to a point outside that territory but within the commercial zone of a municipality within the territory.

3. Whether the evidence shows that petitioner "knowingly and willfully" operated beyond the limits of its certificate.

## STATUTES INVOLVED

Section 206 of the Interstate Commerce Act (49 U.S.C. 306) provides in pertinent part:

> (a)(1) Except as otherwise provided in this section . . . no common carrier by motor vehicle subject to the provisions of this part shall engage in any interstate or foreign operation on

any public highway . . . unless there is in force with respect to such carrier a certificate of public convenience and necessity issued by the Commission authorizing such operations: *Provided, however*, That . . . if any such carrier or predecessor in interest was in bona fide operation as a common carrier by motor vehicle on June 1, 1935, over the route or routes or within the territory for which application is made and has so operated since that time . . . the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served . . . if application . . . is made to the Commission . . . within one hundred and twenty days after this section shall take effect [October 1, 1935] . . . Otherwise the application for such certificate shall be decided in accordance with the procedure provided for in section 207(a) of this part . . . Pending the determination of any such application the continuance of such operation shall be lawful * * *.

* * * * *

Section 222(a) of the Interstate Commerce Act, (49 U.S.C. 322) provides in part:

(a) Any person knowingly and willfully violating any provision of this part, or any rule, regulation, requirement, or order thereunder, or any term or condition of any certificate, permit, or license . . . shall, upon conviction thereof, be fined not less than $100 nor more than $500 for the first offense and not less than $200 nor more than $500 for any subsequent offense. Each day of such violation shall constitute a separate offense.

* * * *

## STATEMENT

Petitioner, W.J. Dillner Transfer Co., is a common carrier by motor vehicle, operating under a Certificate of Public Convenience and Necessity No. MC-21623, dated June 1, 1948, which authorizes it to serve a multi-state area, including "points and places in Pennsylvania, West of U.S. Highway 15, * * * and * * * points and places in New Jersey" (App. I. 22a). On November 23, 1959, a seventeen count information was filed in the United States District Court for the Western District of Pennsylvania charging petitioner with transporting goods from Plymouth Meeting and Fairless, Pennsylvania, (East of U.S. 15) in violation of the territorial restrictions contained in petitioner's certificate (App. I. 4a-11a). Petitioner admitted the acts alleged, but contended that, though the points involved were not within its *Pennsylvania* territory, it could serve these communities under its authority to operate in *New Jersey* since Plymouth Meeting was within the commercial zone of Camden, New Jersey and Fairless within the commercial zone of Trenton, New Jersey (App. I. 15a, 18a-19a). In addition, petitioner moved to dismiss the information on the ground that it failed to negative the specific exception set forth in Section 206(a) pertaining to "grandfather" rights (App. I. 12a, 16a). The district court denied this motion. After a trial by jury, petitioner was found guilty and fined $2,731.92 (App. I. 2a-3a). On appeal, the conviction was affirmed.

## ARGUMENT

1. Petitioner was charged with transporting goods in violation of the territorial restrictions set forth in a described certificate. As the court below ruled, it is not an element of that offense that no administrative proceeding is pending to establish "grandfather" rights to conduct the unauthorized transportation. In *McKelvey* v. *United States*, 260 U.S. 353, this Court stated (p. 357):

> By repeated decisions it has come to be a settled rule in this jurisdiction that an indictment or other pleading founded on a general provision defining the elements of an offense, or of a right conferred, need not negative the matter of an exception made by a proviso or other distinct clause, whether in the same section or elsewhere, and that it is incumbent on one who relies on such an exception to set it up and establish it.
>
> * * *

This rule has been followed by several courts in cases involving uncertificated operation of motor carriers. See *United States* v. *Cooper's Express, Inc.*, Crim. No. 60-248-W (D. Mass.) decided June 8, 1962 (App. II. 3b-4b); *United States* v. *Apex Express, Inc.*, 76 F. Supp. 956 (D.N.J. 1948); *United States* v. *Kelly*, 63 F. Supp. 977 (N.D. Ind. 1945).

Petitioner relies on *United States* v. *English*, 139 F. 2d 885 (C.A. 5), a decision rendered in 1944 before the Rules of Criminal Procedure made clear by Rule 7(c) that an indictment need be only "a plain, concise and definite written statement of the essential facts constituting the offense charged." While in our view the

*English* case is erroneous on its own facts, it is, in any event, distinguishable. There the charge was operating without any certificate, whereas here petitioner was accused of violating the specific limitations of a granted certificate. On the present charge, a claim of pending application to determine grandfather rights beyond the certificate would clearly be merely a matter of defense.

2. Petitioner operates under a territorial certificate in which the scope of permissible operations is defined by physical boundaries forming the perimeter of a broad area, rather than in terms of specific municipalities authorized to be served. The Interstate Commerce Commission has consistently held that motor-carrier authority so defined cannot be construed as allowing any service at any point beyond the limits prescribed, not even collection and delivery service to and from points within the commercial zone of an authorized border municipality. *Commercial Zones and Terminal Areas*, 54 M.C.C. 21, 92-94; *Transportation Activities of Tornetta*, 48 M.C.C. 637; *Commercial Zones and Terminal Areas*, 48 M.C.C. 441. Petitioner's reference to "grandfather" rights is irrelevant since he has never applied to the Commission for a certificate to serve Plymouth Meeting or Fairless based on operations performed in the "grandfather" days as required by the proviso in Section 206(a). Nor is there any merit to the argument that the Commission's rulings are *ex post facto*. The cited decisions only make explicit the already implicit limitations of certificates defined in terms of territorial boundaries. Unlike *Movers Conference of*

*America* v. *United States*, 205 F. Supp. 82 (S.D. Cal. 1962), cited by petitioner (p. 4), there is in this no attempt to change an existing rule through an "interpretive" order so as to cut down authority previously granted. The rulings were announced in 1948 and 1952, and petitioner, if not otherwise aware of it, was expressly told in correspondence in 1957 with the District Supervisor that the Commission had consistently refused to consider operations beyond the boundaries of a territorial certificate (Appx. L. 48a-51a). Petitioner had ample warning of the prohibited conduct.

3. Although, as noted, petitioner was fully informed as to the Commission's view of the limitations of its certificate it took no action to challenge or obtain a modification of its certification. Rather, in 1958 it chose to ignore the restriction and engage in the transportation set forth in the information. A "knowing and willful act" within the meaning of Section 222(a) means one that is conscious and intentional, deliberate and voluntary, rather than merely negligent. Specific criminal intent is not required. *Inland Freight Lines* v. *United States*, 191 F. 2d 343 (C.A. 10); *United States* v. *Joralemon Brothers, Inc.*, 174 F. Supp. 262 (E.D.N.Y. 1959); *United States* v. *Reid*, 110 F. Supp. 253 (D. Md. 1953). On this evidence, the jury was more than justified in concluding that petitioner's conduct was a deliberate refusal to respect the plain limitations of the certificate under which it was operating. This was all the words "knowingly and willfully" required.

## CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
*Solicitor General.*

HERBERT J. MILLER, JR.,
*Assistant Attorney General.*

BEATRICE ROSENBERG,
EUGENE P. MILLER,
*Attorneys.*

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